

OPINION
56-195

October 3, 1956 (OPINION)

TAXATION

RE: Delinquent Real Estate - Foreclosure - Effect on Mineral Rights

We are in receipt of your letter of September 15, 1956, in which you request an opinion on the following matters.

Are mineral rights and leases affected by a foreclosure action by the county for delinquent taxes on real estate? If such rights are not affected, is it necessary that the Register of Deeds list the names of such mineral holders and leaseholders on the certificate of record owner?

It has been held by our Supreme Court in several cases that mineral deeds, mineral leases and transfers of royalties are real property.

In the case of Northwestern Improvement Company v. Morton County, 78 N.D. 29, 47 N.W.2d. 543, the court held and it has been cited as authority in the case of McGee v. Stokes' Heirs at Law that after severance, the surface and minerals are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance. This citation is found in the case of McGee v. Stokes' Heirs at Law, 76 N.W.2d., page 155, column 2.

The same applies to royalties. We find in the case of Corbett v. LaBere, 68 N.W.2d. on page 213 the following: "The subject of this instrument is a 'royalty'. The appellant contends that the royalty conveyed was personal property, not an interest in real estate, was dependent entirely upon the estate of the mortgagor, Julius Bolstad, and that it was not necessary to join in the foreclosure action the owner of the royalty in order to have his interest eliminated. On the other hand, the plaintiff and respondent contends that the royalty was an interest in the real estate which was not affected by the foreclosure action to which the plaintiff, a royalty owner, was not a party. The lease which the Bolstads executed in favor of Thomas W. Leach on November 23, 1935, was for a period of ten years or as long as the lessee produced oil and gas, or either of them. It conveyed to the lessee an interest which under such leases is generally known as a working interest. It is an interest in real property." See Petroleum Exchange, Inc., v. Poynter, N.D., 64 N.W.2d. 718; Ulrich v. Amerada Petroleum Corp. N.D., 66 N.W.2d. 397.

In the case of Corbett v. LaBere, supra, it is interesting to note what the court states on page 214, column 2, "Some courts, particularly those of Kansas, hold that a royalty is personal property. Tegarden v. Beers, 175 Kan. 610, 265 P.2d. 845; Lathrop v. Eyestone, 170 Kan. 419, 227 P.2d. 136. But the great weight of authority holds that unaccrued oil and gas royalty is an interest in real estate, especially among those courts that hold as we do that the ordinary oil and gas lease conveys an interest in real property."

For other cases in point see *Smith v. Cook*, 73 N.W.2d. 151. In that case the defendant for an answer in order to procure the vacation of a judgment for the purpose of interposing an answer set out that the tax deed executed to the land involved did not affect his leasehold interest in the property and the court held that such answer was a good answer and stated a defense. Therefore, by inference, it follows that said decision held that the minerals, either by deed, lease, or transfer of royalty, constitute a separate title to the land and would have to be assessed and taxed separately. Unless it was so assessed and taxed separately the tax deed to the surface land would not affect his rights as a holder of the lease of the minerals.

The last case on the subject that we find in this state is *Bilby v. Wire*, 77 N.W.2d. 882. In this case we quote from the syllabi and the statements are fully supported by the text. Syllabus 2. "Where a county takes tax title, after severance of surface and mineral estates, and property is described by its government description without mention of mineral interests separately from the surface, county acquires tax title to the surface only."

It is, therefore, my opinion that where the minerals are severed, either by mineral deed, mineral lease, or transfer of royalty, the same is separated from the title to the surface and must be taxed separately or it does not affect the mineral rights or minerals that have not been removed from the land.

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